APPENDIX A—ORDER AND JUDGMENT OF THE UNITED STATES COURT OF APPEALS FOR THE TENTH CIRCUIT DECIDED OCTOBER 23, 2002

United States Court of Appeals For The Tenth Circuit Decided October 23, 2002.
No. 02-4049

Roger Liverman, Jr.,
Plaintiff-Appellant,
v
Committee on the Judiciary,
U.S. House of Representatives,
Defendant-Appellee.

ORDER AND JUDGMENT[1]

Before **KELLY**, **McKAY**, and **MURPHY**, Circuit Judges.[2]

Plaintiff-Appellant Roger A. Liverman appeals the dismissal of his pro se complaint seeking monetary and injunctive relief against the Committee of the Judiciary of the United States House of Representatives ("the Committee"). Our jurisdiction arises under 28 U.S.C. §1291 and we affirm.

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[1] This order and judgment is not binding precedent, except under the doctrine of law of the case, re judicata, and collateral estoppel. This court generally disfavors the citation of orders and judgments; nevertheless, an order and judgment may be cited under the terms and conditions of 10th. Cir. R. 36.3.

[2] After examining the briefs and the appellate record, this three-judge panel has determined unanimously that oral argument would not be of material assistance in the determination of this appeal. See Fed. R. App. P. 34 (a); 10th Cir. R. 34.1(G). The cause is therefore ordered submitted without oral argument.

In September 1997, Mr. Liverman filed a pro se Petition for a Redress of Grievances and a Private Claim with the United States House of Representatives ("the Petition"). Dissatisfied with the Committee's lack of response and failure to set a hearing on his Petition, Mr. Liverman filed Writs of Mandamus in November 1998("1998 Writ") and August 1999("1999 Writ") asking the district court to set a time and date for a hearing before the Committee. Mr. Liverman voluntarily dismissed the 1998 Writ, and in January 2000, the district court dismissed the 1999 Writ, which alleged that the Committee's inaction violated his due process and freedom of speech rights.

We affirmed the district court's January 2000 dismissal, citing Minnesota State Bd. for Community Colleges v Knight, 465 U.S. 271, 283-285 (1984, holding that members of the public enjoy no constitutional right to be heard by members of Congress. Aplee. Supp. App. 25-26. While that appeal was pending, Mr. Liverman filed yet another action asserting substantially similar claims. The district court dismissed sua sponte, holding that the judicial branch cannot compel the legislative branch to hear his Petition. Aplee. Supp. App. 29-30.

On May 29,2001, Mr. Liverman filed the current action. In this latest version, Mr. Liverman alleges that the manner employed by the Committee to review and process his Petition was "plainly arbitrary, capricious, unequal and standardless and it in violation of fundamental principles of Equal Protection and Due Process Clauses [sic] of the Fourteenth Amendment...."Aplee. Sup. App.33. On March 5, 2002, the district court dismissed Mr. Liverman's complaint pursuant to Fed. R. Civ. P. 12 (b)(6), holding that (1) sovereign immunity

barred the suit, (2) it lacked subject matter jurisdiction to order the Committee to perform a legislative function, and (3) inasmuch as the Petition called for the initiation of impeachment proceedings against various United States officials, Mr. Liverman lacked a judicially cognizable interest in the prosecution of another. R. Doc. 35 at 1-2.

Our review is de novo. See Sutton v, Utah State Sch. for the Deaf & Blind, 173 F.3d 1226, 1236 (10th Cir. 1999). A Rule 12(b)(6) dismissal will be upheld if, accepting the facts pleaded in the complaint as true, it appears "beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." Id. (quoting GFF Corp. v Associated Wholesale Grocers Inc., 130 F. 3d 1381, 1384(10th Cir. 1997).

On appeal, Mr. Liverman raises various procedural challenges. He argues that (1) various local rules of the federal district court and the Tenth Circuit violate equal protection because they treat pro se cases different than counseled cases, (2) he did not receive the full benefit of the right to due process because (a) the action was dismissed based upon the pleadings, (b) the district court dismissed the action (i) without a report and recommendation from the assigned magistrate judge,(ii) when the factual contentions relied upon lacked evidentiary support, and (iii) he was denied initial pretrial disclosures from the Defendant,

As to Mr. Liverman's equal protection argument, we note first that Mr. Liverman did not raise this claim in the proceedings below. This Court has consistently declined to consider arguments raised for the first time on appeal. See McDonald v Kinder-Morgan Inc., 287 F.3d 992,999 (10th Cir. 2002). Although we have at times exercised discretion to address such arguments, we do so

only under "extraordinary circumstances," id., such as where resolution of an issue is "beyond reasonable doubt, and the failure to address the issues would result in a miscarriage of justice." Petrini v Howard, 918 F. 2d 1482, 1483 (10th Cir. 1990). Finding no reason to depart from our general rule, we decline to address this argument.

As to Mr. Liverman's claim that the district court erroneously dismissed his action on the pleadings without a hearing, we note that there is no right to an oral hearing under Fed. R. Civ. 12(b) (6). See Greene v WCI Holdings Corp., 136 F.3d 313, 315-316 (2d Cir. 1998). Whether to grant such a hearing is left to the discretion of the district court judge. Id. at 316. The district court did not abuse its discretion by dismissing Mr. Liverman's action without a hearing. Cf. Geear v, Boulder Community Hospital, 844 F. 2d 764, 766 (10th Cir, 1998) (hearing requirement for summary judgment motions satisfied by court's review of documents submitted by parties).

Mr. Liverman also claims that the district court deprived him of due process by dismissing his action via an order containing "factual contentions" that lacked evidentiary support. Applt. Br. At 18. Mr., Liverman takes issue with the court's characterization of his current claim as "similar" to his other lawsuits and with the court's observation that he was "dissatisfied with the committee's response" to his Petition. Id. However, Mr. Liverman fails to indicate how the court's language in any way denied him of due process. Moreover, the district court's order in no way depended on the accuracy of the benign introductory statements of which Mr. Liverman complains. Consequently, this contention is meritless.

Mr. Liverman's claim that the district court erroneously dismissed his action without a report and recommendation by the assigned magistrate judge is similarly without merit. Implicit in district court's discretionary authority under 28 U.S.C. § 636(b)(1)(B) to refer a matter to a magistrate is the power to withdraw a reference. Cf. 28 U.S.C. § 636(c)(4) (permitting withdraw of reference by district court in consent cases). Moreover, nothing in Section 636 suggests that a district court is constrained to act on a motion pending before the court until the magistrate has issued a recommendation. Consequently, the district court did not err in granting the Committee's motion to dismiss without first awaiting a recommendation by the magistrate judge.

Mr. Liverman also contends that the district court erred in staying discovery pending resolution of the Committee's motion to dismiss. We review district court rulings on discovery motions for an abuse of discretion. See Diaz v Paul J. Kennedy Law Firm, 289 F.3d 671, 674 (10th Cir, 2002). After a careful review of the record we cannot say that the district court abused its discretion. This conclusion is buttressed by the fact that the Committee raised sovereign immunity and other immunity-based defenses in its motion to dismiss. The Supreme Court has recognized where a defense of qualified immunity has been raised, "[u]ntil [the] threshold immunity question is resolved, discovery should not be allowed." Siegert v, Gilley, 500 U.S. 226, 231 (1991). Finding no logical reason why this rule should not apply where the defendant is primarily one of law, we conclude that the district court did not abuse its discretion in staying discovery pending resolution of the Committee's motion to dismiss.

On the merits, Mr. Liverman contends that the district court erred by dismissing on the grounds of sovereign immunity and lack of subject matter jurisdiction. Under the doctrine of sovereign immunity, the United States is immune from suit unless it consents to be sued. See United States v Sherwood, 312 U.S. 584, 586 (1941). Moreover, "the existence of consent is a prerequisite for jurisdiction." United States v. Mitchell, 463 U.S. 206, 212 (1983). The Unites States consents to suit only when Congress "unequivocally expresses in statutory text its intention to waive the United States' sovereign immunity." United States v. Richman (In re Talbot), 124 F.3d 1201,1206 (10th Cir. 1997)(citing United States v Nordic Village, Inc., 503 U.S. 30,33(1992)).

As the district court recognized, Congress has not consented to the present action. Aware of this jurisdictional hurdle to maintenance of his suit, Mr. Liverman argues that by enacting 28 U.S.C. § 1331, which provides for federal court jurisdiction of all civil actions "arising under the Constitution laws, or treaties of the United States," Congress has effectively waived sovereign immunity in all federal question cases, Mr. Liverman's argument is without merit. Obviously, acceptance of such an argument would necessarily eliminate the doctrine of sovereign immunity as a jurisdictional bar to suits against the United States. Moreover, this Court has specifically held that "[g]eneral jurisdictional statutes such as 28 U.S.C. §1331 do not waive the Government's sovereign immunity." Wyoming v United States, 279 F.3d 1214, 1225 (10th Cir. 2002)(citing Lonsdale v United States, 919 F. 2d 1440, 1443-44(10th Cir. 1990).

AFFIRMED.

Entered for the Court
Paul J Kelly, Jr.
Circuit Judge

APPENDIX B —ORDER OF THE UNITED STATES DISCTRICT COURT FOR THE DISTRICT OF UTAH CENTRAL DIVISION DECIDED MARCH 5, 2002.

In The United States District Court For The District of Utah, Central Division Decided March 5, 2002.
Case No. 01-CV-393B

Roger Liverman, Jr.,
Plaintiff,
v.
Committee on the Judiciary,
Defendant,

Order

Plaintiff, Roger Liverman, Jr., brought this action against the Committee on the Judiciary of the United States House of Representatives. His allegations of violation of his constitutional rights are vague at best. He has filed a petition for redress of grievances with the defendant and is apparently dissatisfied with the committee's response. This is one of similar suits brought by plaintiff and previously dismissed.

Defendant, Committee, has made a motion to dismiss. Plaintiff opposed the motion. Plaintiff is correct that defendant's assertion of qualified immunity is inapplicable as no individual Government personnel are named in the complaint.

However, the complaint must be dismissed. First, the sovereign immunity of the United States and the defendant agency has not been waived. Plaintiff cannot maintain suit directly against the United States, or an agency thereof, in the absence of a specific waiver of sovereign immunity. United States v. Richman (In re Talbot), 124 F.3d 1201, 1206 (10th Cir. 1997); Kelly v United States, 69 F.3d 1503(10th Cir. 1995). The United States and the agency defendant in this case has not consented to suit and the complaint must be dismissed.

Second, assuming plaintiff seeks some form of affirmative relief against defendant, it would appear to require the defendant to perform some legislative function. This Court has no subject matter jurisdiction to grant such relief Scheuer v Rhodes, 416 US 232 (1974). A Bivens action cannot be asserted for relief against a federal agency, Federal Deposit Ins. Corp. v. Meyer, 510 US 471, 483-86 (1994); Anderson v United States, 107 F. Supp. 2nd 191(E.D.N.Y. 2000), nor may a federal court resolve what is essentially a political dispute, Schroder v. Bush, 263 F.3d 1169 (10th Cir. 2001), or matters of Congressional self governance, Vander Jaqt v, O'Neill, 699 F.2d 1166(D.C. Cir. 1982).

Finally, plaintiff as a private citizen, lacks a judicially cognizable interest under the Constitution in the prosecution of another Linda R.S. v Richard D., 410 US 614(1973);Doyle v Okla. Bar. Ass'n, 998 F.2d 1559 (10th Cir. 1993), and plaintiff states no basis on which to maintain his suit. Therefore,

IT IS HEREBY ORDERED the plaintiff's complaint is **Dismissed.**
DATED this 5th day of March, 2002.

BY THE COURT:
"s/Dee V. Benson, Chief Judge"
Dee V. Benson, Chief Judge
United States District Court